

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0322**

State of Minnesota,
Respondent,

vs.

Samuel Lee Griffith,
Appellant.

**Filed January 30, 2023
Affirmed in part, reversed in part, and remanded
Slieter, Judge**

Hennepin County District Court
File No. 27-CR-19-17009

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney,
Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Max Brady Kittel, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Reyes, Judge; and Frisch,
Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

Appellant argues that the district court abused its discretion by failing to grant a downward dispositional sentencing departure, claiming he is particularly amenable to probation. Because the district court acted within its discretion by sentencing appellant to

an executed sentence, we affirm. However, because the district court erred by entering a judgment of conviction for a lesser-included offense, we reverse and remand for the district court to vacate that conviction.

FACTS

Respondent State of Minnesota charged appellant Samuel Lee Griffith with one count of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2018), and one count of second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(a) (2018). The complaint alleged that Griffith, age 64, engaged in sexual penetration and sexual contact with a four-year-old female (child) under his care by licking and touching her vaginal area.

In June 2021, Griffith waived his right to a jury trial and agreed with the prosecutor to have the matter tried by the court based on stipulated evidence pursuant to Minn. R. Crim. P. 26.01, subd. 3. The prosecutor informed the district court that the parties' agreement contemplates that, if the district court finds Griffith guilty of first-degree criminal sexual conduct, Griffith would only serve a maximum of 48 months in prison—a downward durational departure from the Minnesota Sentencing Guidelines presumptive commitment of 144-172 months. *See* Minn. Sent'g Guidelines 4.B (2018).

In August 2021, the district court found Griffith guilty of first-degree and second-degree criminal sexual conduct and ordered a presentence investigation report (PSI) and psychological evaluation.

During the sentencing hearing in December 2021, the state asked the district court to sentence Griffith to 48 months in prison pursuant to the parties' agreement. The state

explained the “reasons for the departure” by citing Griffith’s lack of criminal history, “his age, possible intoxication at the time, as well as that this was a single incident.” The state also acknowledged that proceeding with a stipulated-evidence trial “save[d] the [child] from coming and having to testify” and “save[d] her family from having to come in and deal with everything that goes along with trial.”

Griffith’s attorney next orally moved for a downward dispositional departure to place Griffith on probation. The district court entered a conviction and imposed an executed 48-month sentence—a downward durational departure—and ten years of conditional release for first-degree criminal sexual conduct. The district court did not directly address Griffith’s motion for a downward dispositional departure. The district court also entered a conviction for second-degree criminal sexual conduct though it did not impose a sentence for that offense.

Griffith appeals.

DECISION

I. Dispositional Departure

We review the district court’s sentencing decision for an abuse of discretion. *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014); *State v. Larson*, 473 N.W.2d 907, 908 (Minn. App. 1991). The Minnesota Sentencing Guidelines establish presumptive sentences for felony offenses. Minn. Sent’g Guidelines 4.B. The guidelines seek to “maintain uniformity, proportionality, rationality, and predictability in sentencing.” Minn. Stat. § 244.09, subd. 5(2) (2022). A district court may depart from the presumptive sentence only when there are “identifiable, substantial, and compelling circumstances to

support a departure.” Minn. Sent’g Guidelines 2.D.1 (2018); *see also State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). A downward dispositional departure occurs when the sentencing guidelines recommend imprisonment, but the district court stays the prison sentence. Minn. Sent’g Guidelines 1.B.5.a(2) (2018).

The Minnesota Sentencing Guidelines provide a nonexclusive list of mitigating factors that could support a downward dispositional departure. Minn. Sent’g Guidelines 2.D.3.a (2018). An offender being “particularly amenable to probation” is one of the mitigating factors. Minn. Sent’g Guidelines 2.D.3.a(7). Particular amenability to probation can be shown by the defendant’s age, prior record, remorse, cooperation, attitude while in court, and the support of friends or family. *Soto*, 855 N.W.2d at 310. These are often referred to as the *Trog*¹ factors. *See State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011).

With a zero criminal-history score, Griffith’s first-degree criminal-sexual-conduct conviction results in a presumptive executed prison sentence of 144-172 months. *See* Minn. Sent’g Guidelines 4.B. The district court imposed a 48-month prison sentence, a downward durational departure. *See id.*; Minn. Sent’g Guidelines 1.B.5.b(2) (2018).

Griffith argues that the district court abused its discretion “when it found multiple factors supporting a downward dispositional departure [in granting the durational departure] but failed to address . . . Griffith’s motion for a downward dispositional departure.” We are not persuaded.

¹ *See State v. Trog*, 323 N.W.2d 28 (Minn. 1982).

Griffith's argument to the district court in support of a dispositional departure was limited to statements from his attorney:

Counsel: Your Honor, we are asking for a dispositional departure in this case. I believe it's warranted for Mr. Griffith based on his lack of criminal history, the fact that he would be particularly amenable [to] probation. He's been on conditional release. There was only one issue the entire time he was on conditional release.

I think it's also important to note that Mr. Griffith shows a combination of remorse and accepting responsibility even in the face of maintaining his innocence

. . . Mr. Griffith indicated his care and concern for the child. That he was taking care of this child . . . from a very young age from a baby. When no one else was available to care for this child, Mr. Griffith was there taking care of this child.

The allegations that . . . the Court found Mr. Griffith guilty of was a single incident, some potential substance issues . . . have been resolved through conditional release. And so I think Mr. Griffith would be particularly amenable to probation and, therefore, a dispositional departure would be warranted in this case.

In granting the durational departure, the district court identified, among other reasons, Griffith's age and limited criminal history. These are both *Trog* factors and, therefore, not factors that support a durational departure. *Compare Trog*, 323 N.W.2d at 31 (citing "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family" as relevant factors that may justify a dispositional departure), *with State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) ("A durational departure must be based on factors that reflect the seriousness of the *offense*, not the characteristics of the offender."). However, Griffith cites to no caselaw, and we are

aware of none, concluding that a district court which cites to an offender-related factor to support a durational departure abuses its discretion by not also imposing a dispositional departure. Moreover, even when a district court finds that *Trog* factors are present, the district court is not *required* to grant a downward dispositional departure. *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009). Therefore, the district court did not abuse its discretion when it declined to grant a dispositional departure.

Further, we will not disturb a presumptive sentence if “the record shows that the sentencing court carefully evaluated all the testimony and information presented,” even if there were grounds that would justify a departure. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (quotation omitted), *rev. denied* (Minn. Sept. 17, 2013); *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). Only in a “rare” case will we reverse the district court’s refusal to depart from a presumptive sentence. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018) (quoting *Kindem*, 313 N.W.2d at 7).

At the outset of the sentencing hearing, the district court explicitly stated that it reviewed Griffith’s PSI and psychosexual evaluation prior to sentencing. The PSI outlined aggravating factors in support of its sentencing recommendation of 144 months’ imprisonment, noting Griffith’s cooperation with the PSI process but flagging his continued denial of criminal wrongdoing. *See* Minn. Sent’g Guidelines 2.D.3.b (2018). The psychosexual evaluation largely revealed mitigating factors, including Griffith’s fitness for outpatient sex-offender treatment. *See* Minn. Sent’g Guidelines 2.D.3.a(7) (amenability to probation “may . . . be supported by the fact that the offender is particularly amenable to a relevant program of individualized treatment in a probationary setting”).

The district court also heard sentencing arguments from the prosecutor and Griffith's attorney, along with Griffith's own statement during sentencing: "I still say I didn't do this."

The record reflects that the district court deliberately considered the circumstances for and against granting a dispositional departure. And although the district court did not explicitly explain its reasoning for declining to grant a dispositional departure, this was well within the district court's discretion because reasoning is not required when the district court considers factors supporting departure but elects to impose the presumptive sentence. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

II. Multiple Convictions

Minnesota law provides that "[u]pon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2022). An included offense is "a lesser degree of the same crime" or "a crime necessarily proved if the crime charged were proved." *Id.*, subd. 1(1), (4).

Griffith was found guilty of first-degree, and the lesser-included offense of second-degree, criminal sexual conduct. *See State v. Kobow*, 466 N.W.2d 747, 752 (Minn. App. 1991), *rev. denied* (Minn. Apr. 18, 1991) (stating that second-degree criminal sexual conduct is a lesser-included offense of first-degree criminal sexual conduct). The district court entered convictions for both counts. We review this legal question *de novo*. *Spann v. State*, 740 N.W.2d 570, 572, 573-74 (Minn. 2007).

Though not raised by either party, we may address the issue *sua sponte* because "it is the responsibility of appellate courts to decide cases in accordance with law, and that

responsibility is not to be diluted by counsel's oversights, lack of research, failure to specify issues or to cite relevant authorities." *State v. Hannuksela*, 452 N.W.2d 668, 673-74 n.7 (Minn. 1990) (quotation omitted). If the law surrounding the issue is not novel or questionable, additional briefing is not necessary. *See id.* (suggesting that solicitation of additional briefing is appropriate for novel or questionable issues).

The district court erred when it entered a conviction on the lesser-included offense. Thus, we reverse and remand for the district court to vacate the conviction for second-degree criminal sexual conduct.

Affirmed in part, reversed in part, and remanded.